

1-1-1992

## Son of Sam Laws after *Simon & (and) Schuster v. New York Crime Victims Board*: Free Speech Versus Victims' Rights

Kelly Franks

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### Recommended Citation

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# **“Son of Sam” Laws After *Simon & Schuster v. New York Crime Victims Board*: Free Speech Versus Victims’ Rights**

*by*  
KELLY FRANKS\*

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## Introduction

The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards.<sup>1</sup>

Unscrupulous writers, and there are plenty of them, now have the option of getting together with unscrupulous prisoners, and there's even more of them, and producing a lot of horse poop. But then, a lot of horse poop is inevitable under a free press.<sup>2</sup>

The true crime genre has boomed in recent years to an unprecedented level of popularity.<sup>3</sup> In both publishing and television, stories of actual crimes have increasingly served to satisfy the public's morbid curiosity about such tales. Perhaps witnessing a criminal's recitation of his crime as a form of entertainment "becomes an acceptable substitute for 'live performances in the Roman arena' . . . ."<sup>4</sup> In turn, this entertainment can be quite lucrative for the criminals who create it. Outraged by this reality, the New York legislature enacted its Son of Sam law. The law, "conceived in haste, written in haste, and declared under the cry of the public for the Legislature to enact retribution, reflects the noble spirit, though clothed in loose, vague and inconsistent language."<sup>5</sup>

In *Simon & Schuster v. New York Crime Victims Board*,<sup>6</sup> the United States Supreme Court unanimously<sup>7</sup> struck down New York's "Son of Sam" law as violative of the First Amendment. The law required that a criminal's profits from works describing his crime be withheld from the criminal and made available to the victims of that crime.<sup>8</sup> The Court determined that this was a content-based restriction on speech, subject to strict scrutiny, and held that the statute could not survive such scrutiny.<sup>9</sup> The decision was hailed by some as a broad defense of the right to free speech<sup>10</sup> and criticized by others as a major blow to victims' rights.<sup>11</sup>

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1. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922) (Taft, C.J.).

2. David Streitfeld, *The Cash Course in Crime Writing: Publishers and Prisoners on "Son of Sam" Ruling*, WASH. POST, Dec. 11, 1991, at C1 (quoting Jack Olsen).

3. Meg Cox, "Sam" Ruling Likely to Spark Media Scramble, WALL ST. J., Dec. 11, 1991, at B1, B12.

4. *In re Johnsen*, 430 N.Y.S.2d 904, 906 (N.Y. Sup. Ct. 1979).

5. *Id.*

6. 112 S. Ct. 501 (1991).

7. The Justices voted 8-0, finding the law unconstitutional; Justices Blackmun and Kennedy filed concurring opinions; Justice Thomas took no part in consideration of the case.

8. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991) (repealed 1992).

9. *Simon & Schuster*, 112 S. Ct. at 512.

10. David G. Savage, *Laws Denying Criminals Profits From Stories Voided*, L.A. TIMES, Dec. 11, 1991, at A16.

Requiring criminals to compensate their victims for their injuries and out-of-pocket losses is a noble objective. However, singling out a criminal's speech-related profits is not only unconstitutional, it is also a severely limited and highly ineffective way of achieving the victim compensation objective. It is safe to assume that the vast majority of criminals in this country do not sell the stories of their crimes. Consequently, the vast majority of victims are entirely unaffected by current Son of Sam laws. Together, *Simon & Schuster* and second-generation Son of Sam laws should encourage free speech while also increasing the number of victims compensated by the perpetrator, rather than by the State. This note suggests alternatives for reaching such a result.

Part I of this note will analyze New York's original Son of Sam law. It discusses the legislative history and applications of the law, and compares similar laws of other states. Part II examines the *Simon & Schuster* case in detail. First it introduces the history of the case, then it analyzes the decision, comparing the language and reasoning of Justice O'Connor's opinion with other First Amendment cases. Finally, Part III suggests Son of Sam legislation that conforms with the Supreme Court's decision. Here the author recommends alternatives for expanding the means by which crime victims can recover compensation from their victimizer without singling out speech-related profits, and encourages legislatures faced with rewriting their Son of Sam statutes to pursue such a course.

## I

### New York's "Son of Sam" Statute

In the summer of 1977, David Berkowitz, known to the public only by the pseudonym "Son of Sam," terrorized the streets of New York with a series of random shootings that left six people dead and seven others injured.<sup>12</sup> While Berkowitz was still at large, rumors circulated that members of the media were making offers to pay the Son of Sam large sums of money in exchange for publishing rights to his personal account of his gruesome crimes.<sup>13</sup> New York State Senator Emanuel R. Gold responded by sponsoring a bill designed to prevent a criminal from profiting by recounting his crime while his victims remained uncompensated. Gold proclaimed:

It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of

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11. Esther B. Fein, *Decision Praised as a Victory for Free Speech Rights*, N.Y. TIMES, Dec. 11, 1991, at B8.

12. Fred Fedler, *When Headlines are Bought*, BARRISTER, Fall 1980, at 15.

13. *Criminals' Revenues from Stories Curbed*, N.Y. TIMES, Aug. 13, 1977, at 20.

money for his story once he is captured—while five people are dead, other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.<sup>14</sup>

The bill passed and became New York Executive Law section 632-a.<sup>15</sup> Since then, forty-two other states and the federal government have adopted similar laws,<sup>16</sup> often in response to particularly notorious crimes.<sup>17</sup>

The New York law required that any entity contracting with a criminal for the reenactment of his crime "by way of a movie, book, magazine article, tape recording, phonographic record, radio or television presenta-

14. N.Y. LEGIS. ANN. 1977, at 267 (Mem. of Sen. Emanuel R. Gold).

15. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991). The law is formally titled "Distribution of Moneys Received as a Result of the Commission of Crime." Originally enacted in 1977, the statute was amended in 1978 and 1981 to strengthen its scope, expand its coverage, and set forth priorities for paying out the money in the escrow account. Brief for Respondents at 7, *Simon & Schuster*, 112 S. Ct. 501 (1991) (No. 90-1059) (hereinafter Brief for Respondents).

16. As of January 1992, the state statutes are: ALA. CODE §§ 41-9-80 to -84 (1991); ALASKA STAT. § 12.61.020 (1990); ARIZ. REV. STAT. ANN. § 13-4202 (1989); ARK. CODE ANN. § 16-90-308 (1989); CAL. CIV. CODE § 2225 (West Supp. 1992); COLO. REV. STAT. §§ 24-4.1-201 to -207 (1990); CONN. GEN. STAT. ANN. § 54-218 (West 1985); DEL. CODE ANN. tit. 11, §§ 9101-9106 (1987 & Supp. 1990); FLA. STAT. ANN. § 944.512 (West 1985 & Supp. 1992); GA. CODE ANN. § 17-14-30-32 (Michie 1990); HAW. REV. STAT. § 351-81-88 (Supp. 1989); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 70, para. 411 (Smith-Hurd 1989 & Supp. 1991); IND. CODE ANN. §§ 16-7-3.7-1 to -6 (Burns 1990); IOWA CODE ANN. § 910.15 (West Supp. 1991); KAN. STAT. ANN. §§ 74-7319 to -7321 (Supp. 1989); KY. REV. STAT. ANN. § 346.165 (Michie/Bobbs-Merrill 1983); LA. REV. STAT. ANN. §§ 46:1831-1839 (West 1982); MD. ANN. CODE art. 27, § 764 (1988); MASS. GEN. LAWS ANN. ch. 258A, § 8 (West 1988); MICH. COMP. LAWS ANN. § 780.768 (West Supp. 1991); MINN. STAT. ANN. § 611A.68 (West 1987 & Supp. 1992); MISS. CODE ANN. §§ 99-38-1 to -11 (Supp. 1990); MO. ANN. STAT. § 595.045(14) (Vernon Supp. 1991); MONT. CODE ANN. § 53-9-104(1)(d) (1989); NEB. REV. STAT. §§ 81-1836 to -1842 (1987); NEV. REV. STAT. § 217.265 (1986); N.J. STAT. ANN. §§ 52:4B-26-33 (West 1986); N.M. STAT. ANN. § 31-22-22 (Michie Supp. 1990); OHIO REV. CODE ANN. §§ 2969.01 to 2969.09 (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 17 (West Supp. 1992); OR. REV. STAT. § 147.275 (1990); PA. STAT. ANN. tit. 71, § 180-7.18 (1990); R.I. GEN. LAWS §§ 12-25.1-1 to -12 (Supp. 1990); S.C. CODE ANN. §§ 15-59-40 to -80 (Law. Co-op. Supp. 1990); S.D. CODIFIED LAWS ANN. § 23A-28A-1 (1988); TENN. CODE ANN. §§ 29-13-201 (1980); TEX. REV. CIV. STAT. ANN. art. 8309-1, §§ 16 to 18 (West Supp. 1992); VA. CODE ANN. §§ 19.2-368.19 to .22 (Michie 1990); WASH. REV. CODE ANN. §§ 7.68.200 to .280 (West Supp. 1991); WIS. STAT. ANN. § 949.165 (West 1990); WYO. STAT. § 1-40-112(d)-(g) (1988). The federal statute is 18 U.S.C. §§ 3681-3682 (1988).

17. Sue S. Okuda, Note, *Criminal Anti-Profit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 CAL. L. REV. 1353, 1355 (1988). For example: California's Son of Sam law was enacted in 1983, the year that Dan White was paroled from prison for assassinating San Francisco Mayor George Moscone and Supervisor Harvey Milk; Massachusetts' was enacted in 1987 after Gerald W. Clemente, a police captain convicted of bank robbery, wrote *The Cops Are Robbers*; Kansas enacted anti-profit legislation after Reverend Thomas Bird's murder of both his wife and his mistress' husband generated great media interest; and Virginia passed its statute after Montie Rissell published his autobiography describing his conviction for the murders of five Virginia women. *Id.*

tion, live entertainment of any kind, or from the expression of such [criminal's] thoughts, feelings, opinions or emotions regarding such crime,"<sup>18</sup> must pay to the New York Crime Victims Board ("the Board") all money which would otherwise be paid to the criminal. The statute defined "criminal" broadly to include a person accused or convicted of a crime committed in New York,<sup>19</sup> a person found not guilty by reason of mental disease or defect,<sup>20</sup> or a person who "voluntarily and intelligently" admits committing a crime.<sup>21</sup> Many of the other laws define criminal much more narrowly to include only convicted criminals. California's and the federal government's statutes are examples of this.<sup>22</sup>

The funds paid to the Board were then to be held in escrow for five years from the date the escrow account was established.<sup>23</sup> A victim was required to obtain a civil money judgment against the criminal within the five-year escrow period in order to collect from the account.<sup>24</sup> A civil action could be brought at any time during the five-year escrow period, even if a suit would otherwise be barred by the statute of limitations.<sup>25</sup> This provision was interpreted as creating a new and independent cause of action exclusively against the escrow fund but not against any other assets of the criminal.<sup>26</sup>

Section 632-a established priorities for paying claims out of the funds held in escrow.<sup>27</sup> It gave highest priority to the criminal for the exclusive purpose of retaining legal representation in defense of the criminal charge;<sup>28</sup> second priority to state's subrogation claims against the criminal for state payments made to the victims of the crime;<sup>29</sup> and third priority to the civil judgments of the victim.<sup>30</sup> The legislature gave fourth priority to all other creditors of the criminal, including state and local tax authorities.<sup>31</sup> Finally, the state entitled the criminal to payment from the account of any remaining funds.<sup>32</sup>

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18. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982 & Supp. 1991) (repealed 1992).

19. *Id.* § 632-a(1).

20. *Id.* § 632-a(5).

21. *Id.* § 632-a(10)(b).

22. CAL. CIV. CODE § 2225(a)(1) (West Supp. 1992); 18 U.S.C. §§ 3681-3682 (1988).

23. N.Y. EXEC. LAW § 632-a(1).

24. *Id.*

25. *Id.* § 632-a(7).

26. *Barrett v. Wojtowicz*, 414 N.Y.S.2d 350, 357 (App. Div. 1979).

27. N.Y. EXEC. LAW § 632-a(11).

28. *Id.* § 632-a(8) & (11)(a). The Board also had discretion to give priority to payments necessary for producing the work that would yield the funds, if it found this to be in the best interests of the victim. *Id.*

29. *Id.* § 632-a(11)(b).

30. *Id.* § 632-a(11)(c).

31. *Id.* § 632-a(11)(d).

32. *Id.* § 632-a(11)(e).

Since its enactment in 1977, section 632-a has been applied in only a handful of cases.<sup>33</sup> Some of these cases include that of Jean Harris, the Madeira School headmistress who killed Scarsdale Diet doctor Herman Tarnower; Mark Chapman, assassin of John Lennon; R. Foster Winans, the *Wall Street Journal* reporter convicted of insider trading;<sup>34</sup> John Wojtowicz, whose Brooklyn bank robbery and hostage taking became the basis for the motion picture *Dog Day Afternoon*;<sup>35</sup> and Jack Henry Abbot, convicted murderer turned author who was befriended by Norman Mailer and became a cause celebre in New York's literary circles.<sup>36</sup> Ironically, the statute was never applied to the Son of Sam himself. Berkowitz was found incompetent to stand trial, and at that time the statute applied only to *convicted* criminals.<sup>37</sup>

Before *Simon & Schuster* there had been few constitutional challenges to Son of Sam legislation. Courts in only two states, New York<sup>38</sup> and New Jersey,<sup>39</sup> had addressed the First Amendment implications of their Son of Sam laws. Both courts upheld their laws as constitutional. The United States Supreme Court, however, saw things differently.

## II

### *Simon & Schuster v. New York Crime Victims Board*

#### A. History of the Case

Henry Hill was arrested in April 1980 and charged with six counts of conspiracy to sell drugs.<sup>40</sup> In May 1980, Hill entered the Federal Witness Protection Program and was granted immunity from prosecution in exchange for his agreement to cooperate with various law enforcement agencies in ongoing criminal investigations.<sup>41</sup> A year later, Hill con-

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33. Daniel Wise, *Passage of New Son of Sam Law Seen Unlikely; Statute Netted Paltry Sum From Convicted Authors*, N.Y.L.J., Dec. 12, 1991, at 1. From 1977 to the present, the Board has frozen only \$164,994 in criminal profits under section 632-a, and of this amount only \$85,000 has actually been paid to victims. *Id.* In contrast, in the twelve months ending November 30, 1991, the Board has made publicly funded payments to crime victims in the amount of \$8.6 million. *Id.*

34. *Id.* at 1.

35. *Barrett v. Wojtowicz*, 414 N.Y.S.2d 350, 352 (App. Div. 1979).

36. Linda Greenhouse, *High Court Upsets Seizing of Profits on Convicts' Books*, N.Y. TIMES, Dec. 11, 1991, at A1.

37. *Simon & Schuster v. N.Y. Crime Victims Board*, 112 S. Ct. 501, 506 (1991). Ultimately, McGraw-Hill Book Company bought the rights to Berkowitz's story, for which Berkowitz was paid \$75,000. *Court to Rule on "Son of Sam" Book*, WASH. POST, Jan. 28, 1979, at A22.

38. *Children of Bedford v. Petromelis*, 573 N.E.2d 541 (N.Y. 1991).

39. *Fasching v. Kallinger*, 510 A.2d 694 (N.J. 1979), *rev'd on other grounds*, 546 A.2d 1094 (N.J. 1988).

40. Brief for Respondents, *supra* note 15, at 8.

41. *Id.*; *Simon & Schuster*, 112 S. Ct. at 506.

tracted with Simon & Schuster and writer Nicholas Pileggi to cooperate in the preparation and sale of an autobiographical nonfiction story about the mafia.<sup>42</sup> The result was the best-selling book *Wiseguy: Life in a Mafia Family*, the basis for the hit movie *GoodFellas*.

*Wiseguy* was published in 1985. In the book, Hill audaciously declared that "[a]t the age of twelve my ambition was to be a gangster. To be a wiseguy. To me being a wiseguy was better than being president of the United States."<sup>43</sup> Hill went on to confess committing a variety of crimes, the most infamous of which included the theft of \$6 million from Lufthansa Airlines in 1978 and the 1978-1979 Boston College basketball point-shaving scandal.<sup>44</sup>

In 1986 the Board learned of the contract between Hill, Simon & Schuster, and Pileggi. The Board ordered Simon & Schuster to furnish copies of any contracts it had entered into with Hill, to provide the dollar amounts and dates of all payments it had made to Hill, and to suspend all payments to Hill in the future. Simon & Schuster complied with the order. By that time, it had paid Hill's literary agent \$96,250 in advances and royalties on Hill's behalf, and were holding \$27,958 for eventual payment to Hill.<sup>45</sup> After reviewing the literary contract, the Board determined that the content of *Wiseguy* was governed by the Son of Sam law, and ordered that all of Hill's profits be placed in escrow and made available to his victims.

In August 1987 Simon & Schuster brought suit seeking a declaration that the statute violated the First Amendment and an injunction barring its enforcement. The district court upheld the statute as consistent with the First Amendment.<sup>46</sup> On appeal the circuit court also found the statute constitutional, but on slightly different grounds.<sup>47</sup> The Supreme Court granted certiorari in 1991 and reversed the lower court decisions.

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42. Brief for Respondents, *supra* note 15, at 8.

43. NICHOLAS PILEGGI, *WISEGUY: LIFE IN A MAFIA FAMILY* 19 (1985).

44. *Simon & Schuster*, 112 S. Ct. at 506.

45. Publishers' profits are not covered by the law. However, because Simon & Schuster had already paid Hill \$96,250, they were ordered by the Board to pay that amount if Hill failed to turn over the money. It was this order that Simon & Schuster challenged. *Simon & Schuster v. N.Y. Crime Victims Board*, 724 F. Supp. 170, 173 (S.D.N.Y. 1989), *aff'd*, 916 F.2d 777 (2d Cir. 1990), *rev'd*, 112 S. Ct. 501 (1991).

46. *Simon & Schuster v. N.Y. Crime Victims Board*, 724 F. Supp. 170.

47. *Simon & Schuster v. Fischetti*, 916 F.2d 777 (2d Cir. 1990), *rev'd*, 112 S. Ct. 501 (1991). The Second Circuit determined that the statute was subject to strict scrutiny, but held that it withstood that scrutiny because it was narrowly tailored to meet a compelling state interest. *Id.* at 783. The district court, on the other hand, determined the statute to be constitutional under a lesser standard of review because it only incidentally restricted speech. *Simon & Schuster v. N.Y. Crime Victims Board*, 724 F. Supp. at 177.



## B. The Court's Opinion

In an unusually emphatic defense of the First Amendment, the Court struck down New York's Son of Sam law as unconstitutional. Justice O'Connor, writing for the unanimous Court, found the statute to be a content-based financial burden on speech and hence "presumptively inconsistent with the First Amendment."<sup>48</sup> In making this finding, the Court rejected numerous arguments that the law was, in fact, content-neutral.

### 1. The Content-Based/Content-Neutral Dichotomy

Generally speaking, a distinction has been drawn between statutes that are "content-based" and those that are "content-neutral." The former statutes are held to strict scrutiny, while the latter statutes are held to a more lenient standard of review. The Supreme Court's analytical framework for determining content-neutrality has lacked clarity and consistency over the years.<sup>49</sup> By failing to recognize a category of restrictions on speech that does not neatly fit in the content-based/content-neutral dichotomy,<sup>50</sup> the Court has twisted the concept of content-neutrality to the point that it is easy to concoct an argument that virtually any restriction on speech is content-neutral.<sup>51</sup> Not surprisingly, the Board made several arguments in favor of treating New York's Son of Sam statute as a content-neutral law. As set forth below, the Court rejected these arguments and instead found New York's law to be a content-based burden on speech. *Simon & Schuster* and the analysis below clarify that content-neutrality is not an entirely pliable concept.

The Board first argued that the statute was content-neutral because it was not *intended* to suppress certain ideas. The Court flatly rejected this contention, stating that "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment. . . . We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."<sup>52</sup> This recognizes two important principles. First, while improper motivation

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48. *Simon & Schuster*, 112 S. Ct. at 508.

49. E.g., Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 83-84 (1978).

50. *Id.*; Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980).

51. See, e.g., *Young v. American Mini Theaters*, 427 U.S. 50 (1976); *Renton v. Playtime Theaters*, 475 U.S. 41 (1986).

52. *Simon & Schuster*, 112 S. Ct. at 509 (citing *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)). This statement seems to be contrary to the Court's assertion in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), that when determining content-neutrality "the government purpose is controlling." *Id.* at 791.

can serve to invalidate restrictions on speech, its absence does not save a law that has the effect of unduly burdening speech. Second, in regard to regulations that restrict only a particular category of speech, there is at least "a substantial risk that an impermissible consideration has in fact colored the deliberative process."<sup>53</sup>

Next, the Board argued that the law was not a direct burden on speech because a criminal unwilling to speak without guaranteed compensation is an unwilling speaker, and hence unprotected, since "the First Amendment presupposes a willing speaker."<sup>54</sup> This argument, like several others made by the Board and discussed below, was based on the premise that free speech was not directly burdened because the Son of Sam law prohibited only payment and not the underlying speech itself.

This premise was erroneous from the outset. Fundamental and often repeated constitutional doctrine establishes that financial restrictions on speech can directly burden that speech.<sup>55</sup> The Court most clearly expressed this idea in *Buckley v. Valeo*<sup>56</sup>:

A restriction on the amount of money a person or group can spend . . . necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.<sup>57</sup>

In another argument based on this faulty assumption, the Board contended that the statute should be analyzed under the more lenient

53. Stone, *supra* note 49, at 105-06.

54. Brief for Respondents, *supra* note 15, at 19 (citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976)).

55. See *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988); *Meyer v. Grant*, 486 U.S. 414 (1987); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Secretary of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Village of Schaumburg v. Citizens For a Better Env't*, 444 U.S. 620 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976).

56. 424 U.S. 1 (1976). In *Simon & Schuster*, Justice O'Connor made this point by stating that "[i]n the context of financial regulation, it bears repeating . . . that the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster*, 112 S. Ct. at 508.

57. *Buckley*, 424 U.S. at 19. Although this statement was made in connection with financial restrictions on political speech, generally held to the strictest scrutiny of all, the economics of communicating ideas recognized by the Court is equally applicable to other forms of expression. See also Brief for Petitioners at 14, 112 S. Ct. 501 (1991) (No. 90-1059) (hereinafter Brief for Petitioners). ("[W]hat experience teaches and what our law confirms [is that] the incentive of economic gain is the engine that drives free expression.").

standard enunciated in *United States v. O'Brien*.<sup>58</sup> *O'Brien* stands for the proposition that the government can regulate *conduct*, even if such a regulation imposes an incidental burden on speech, so long as the regulation meets particular standards.<sup>59</sup> The Board claimed that the Son of Sam law had only an incidental effect on speech, because it merely sought to regulate the "conduct" of profiting, and not the speech itself.

Although Justice O'Connor rejected this argument only by implication,<sup>60</sup> case law provides strong support for rejecting such a suggestion outright. In response to an identical argument in *Buckley*, the Court stated: "The expenditure of money simply cannot be equated with such conduct [at issue in *O'Brien*]. . . . [T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."<sup>61</sup>

Unfortunately, Justice O'Connor declined to address the Board's next contention that the Son of Sam statute was content-neutral under *Ward v. Rock Against Racism*<sup>62</sup> and *Renton v. Playtime Theaters*.<sup>63</sup> The *Ward-Renton* test is entirely inconsistent with the Court's analysis in *Simon & Schuster*, and for at least three reasons, the Court should have expressly dismissed the Board's argument as untenable.

First, the *Ward-Renton* standard is inapplicable to the Son of Sam law, because the standard only applies when a law merely seeks to regulate the "time, place or manner of speech."<sup>64</sup> Similar to the *O'Brien* anal-

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58. 379 U.S. 367 (1968). It was on this basis that the District Court upheld the Son of Sam statute. *Simon & Schuster v. N.Y. Crime Victims Board*, 724 F. Supp. 170 (S.D.N.Y. 1989), *aff'd*, 916 F.2d 777 (2d Cir. 1990), *rev'd*, 112 S. Ct. 501 (1991).

59. "[W]hen 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," if: (1) the statute is enacted within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 376.

60. The *Simon & Schuster* court rejected the *O'Brien* standard only by reaching the inconsistent conclusion that the statute was content-based and subject to strict scrutiny. *Simon & Schuster*, 112 S. Ct. at 508-09.

61. *Buckley*, 424 U.S. at 16.

62. 491 U.S. 781 (1989).

63. 475 U.S. 41 (1986). In the opinion's only footnote, Justice O'Connor determined that it was unnecessary to decide if the statute could be considered content-neutral under *Ward* and *Renton*, because she had already determined that the Son of Sam law was not narrowly tailored to meet the state interest, a requirement under the *Ward-Renton* test as well. See note 66, *infra*; *Simon & Schuster*, 112 S. Ct. at 511 n.\*.

64. *Ward*, 491 U.S. at 791; *Renton*, 475 U.S. at 46.

ysis,<sup>65</sup> such laws are subject to less exacting scrutiny.<sup>66</sup> The Son of Sam law was not merely a restriction on the time, place or manner of a criminal's speech. A criminal who committed a crime in New York was subject to the same forfeiture of profits regardless of the time or place where he spoke and regardless of the manner in which he spoke.<sup>67</sup>

Second, *Ward* and *Renton* stand for the dubious proposition that, even if a law discriminates on the basis of the content of speech, it is nevertheless content-neutral if it is "justified without reference to the content of the regulated speech."<sup>68</sup> Put another way, a law is content-neutral if it seeks to regulate the "secondary effects" of a particular category of speech, rather than simply trying to suppress that speech.<sup>69</sup> The meaning of "secondary effects" was clarified in *Boos v. Barry*.<sup>70</sup> Justice O'Connor, writing for the majority, explained that regulating secondary effects of speech refers to "regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech."<sup>71</sup>

Remuneration for lawful, protected speech is not a "regulatory target that happens to be associated with" a criminal's speech.<sup>72</sup> Rather, "the incentive of economic gain is the engine that drives free expression."<sup>73</sup> Apart from compensation, the only other conceivable effect of criminals' speech sought to be minimized is the public outrage and sense of injustice that results when criminals profit from the sensationalism of

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65. *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)) (The *O'Brien* test is "little if any different from the standard applied to time, place or manner restrictions."). While *O'Brien* regulates *conduct* that happens to include a form of expression, *Ward* and *Renton* regulate negative effects of speech by restricting the time, place or manner in which that speech may be conducted.

66. A valid time, place or manner restriction (1) must be justified without reference to the content of speech, (2) must be narrowly tailored to serve a significant government interest, and (3) must leave open ample alternative avenues of communication. *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293).

67. See *supra* text accompanying note 18.

68. *Ward*, 491 U.S. at 791; *Renton*, 475 U.S. at 47-50.

69. *Renton*, 475 U.S. at 47. For example, in *Renton* the Court upheld as content-neutral a law which restricted the permissible location of adult movie theaters. The Court reasoned that the law was aimed not at suppressing speech, but at the secondary effects of that speech, namely the deterioration of the surrounding community. Thus far, the Court has not applied the "secondary effects" test outside of effects associated with sexually explicit material. See, e.g., *Boos v. Barry*, 485 U.S. 312, 320 (1988) (Court refused to apply the secondary effects test to a regulation that prohibited picket signs critical of foreign governments within 500 feet of that government's embassy).

70. 485 U.S. 312 (1987).

71. *Id.* at 320.

72. As previously mentioned, the Court "has never suggested that the dependence of a communication on the expenditure of money operates itself . . . to reduce the exacting scrutiny required by the First Amendment." *Buckley*, 424 U.S. at 16.

73. Brief for Petitioners, *supra* note 57, at 14.

their stories.<sup>74</sup> But "[t]he emotive impact of speech on its audience is not a 'secondary effect' " of speech.<sup>75</sup>

The third reason the Court should have rejected the *Ward-Renton* standard and eliminated it as a test for content-neutrality is because that standard is so vague and malleable that it fails to provide clear guidance or consistent results. The Court made a convincing argument that the Son of Sam law was indeed a content-based restriction, even though Justice O'Connor was able to justify the statute "without reference to the content of the regulated speech."<sup>76</sup> This demonstrates that satisfaction of the *Ward-Renton* standard does not necessarily qualify a statute as content-neutral. As Justice Brennan astutely pointed out in his dissent in *Boos*, "such secondary effects offer countless excuses for content-based suppression of . . . speech."<sup>77</sup> The legislature's justification for a restriction, while certainly relevant to the existence and strength of a state interest, fails to transform a restriction based on content into a content-neutral regulation.<sup>78</sup> Justice O'Connor's failure to address this issue will no doubt perpetuate the confusion surrounding content-neutrality; however, the *Simon & Schuster* decision should serve at least to dilute the *Ward-Renton* standard.

## 2. Determination That the Son of Sam Law Was Content-Based

The Court held that the Son of Sam statute was a content-based restriction on speech because (1) it treated income derived from speech more restrictively than it treated income derived from any other means, and (2) it treated a criminal's expression about a particular content, namely his crime, more restrictively than his expression about any other topic:

A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. . . . The Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the

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74. The often quoted phrase by Senator Gold that it is "abhorrent to one's sense of justice and decency" is a prime example of the legislature's concern with the emotive impact of criminals being paid huge sums of money to tell about a crime they are despised for committing in the first place. See *supra* text accompanying note 14. Even in the Brief for Respondents it was argued that "[i]t offends society's sensibilities and sense of fairness when a criminal seeks to profit by capitalizing on his criminal activity while his victims are unable to recover financially for their injuries." Brief for Respondents, *supra* note 15, at 31.

75. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

76. Justice O'Connor articulated a compelling state interest "in compensating victims from the fruits of the crime," a justification lacking reference to the content of a criminal's speech. *Simon & Schuster v. N.Y. Crime Victims Board*, 112 S. Ct. 501, 511 (1991).

77. *Boos*, 485 U.S. at 335 (Brennan, J., dissenting).

78. *Renton*, 475 U.S. at 56 (Brennan, J., dissenting).

State places on no other income, and it is directed only at works with a specified content.<sup>79</sup>

In this regard, the decision is entirely consistent with *Arkansas Writers' Project, Inc. v. Ragland*,<sup>80</sup> a case relied on extensively by Justice O'Connor. In *Ragland*, the Court held that a state sales tax which applied to "general interest" magazines but not to "religious, professional, trade or sports journals" was a content-based regulation subject to strict scrutiny.<sup>81</sup> The two types of selective restriction which required that strict scrutiny be applied to the statute in *Ragland* are identical to the reasons in *Simon & Schuster*. First, the sales tax scheme treated some magazines less favorably than others. Second, "the basis on which Arkansas differentiates between magazines . . . depends entirely on its content."<sup>82</sup> It is this selective financial burden based entirely on the content of the work that most concerns the Court.<sup>83</sup>

Justice O'Connor rejected the Board's attempt to differentiate the Son of Sam law from the discriminatory taxation in *Ragland*. Looking at the statute's effect, O'Connor stated that "both forms of financial burden operate as disincentives to speak."<sup>84</sup>

In fact, the burden imposed by the Son of Sam law involved an even greater infringement on speech than did the taxation scheme struck down in *Ragland*. The Son of Sam law imposed governmental restrictions on the payment of private funds between private entities for protected speech. In contrast to interfering with private financing, the differential tax exemptions, credits, and deductions in *Ragland* were "a form of subsidy that is administered through the tax system."<sup>85</sup> It has often been said that "[a] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."<sup>86</sup> Many staunchly contend that, absent invidious discrimination aimed at sup-

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79. *Simon & Schuster*, 112 S. Ct. at 508.

80. 481 U.S. 221 (1987).

81. See also *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983) (selective taxation which treats the press differently from other enterprises and which treats members of the press differently from each other subject to strict scrutiny).

82. *Ragland*, 481 U.S. at 229.

83. "This is because taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State." *Ragland*, 481 U.S. at 228. The reasoning is that a broad based tax affects a government's entire constituency and is thereby safeguarded from abuse by the political process. If applied only to a small constituency incapable of single-handedly effecting a political change, the tax poses a danger that it could be used to drive certain ideas out of the marketplace. *Id.*

84. *Simon & Schuster v. N.Y. Crime Victims Board*, 112 S. Ct. 501, 508-09 (1991).

85. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983).

86. *Ragland*, 481 U.S. at 236 (Scalia, J., dissenting); *Regan*, 461 U.S. at 549; *Harris v. McRae*, 448 U.S. 297, 324-26 (1980); *Rust v. Sullivan*, 111 S. Ct. 1759, 1772 (1991).

pressing certain ideas, the government can validly subsidize selectively.<sup>87</sup> It is quite a different matter, however, for the government to place hurdles in front of the exercise of free speech by restricting private financing of speech.<sup>88</sup> It was the New York statute's restriction on private, as opposed to public, financing that likely led Chief Justice Rehnquist and Justice Scalia, the Court's economic libertarians and dissenters in *Ragland*, to agree that the statute imposed an impermissible burden on speech.

### 3. *Application of Strict Scrutiny*

Having determined the Son of Sam law to be a content-based restriction on speech, the Court went on to examine it under strict scrutiny. "The Son of Sam law establishes a financial disincentive to create or publish works with a particular content. In order to justify such differential treatment, 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'"<sup>89</sup> The Court determined that although the state's interest in compensating victims from the fruits of crime was compelling, the statute was not narrowly tailored to advance that objective.<sup>90</sup>

#### a. The Compelling State Interest

The Court found that the Son of Sam law was designed to serve the compelling state interest of "compensating victims from the fruits of the crime."<sup>91</sup> It reached this conclusion by combining two independent state interests, both of which were determined to be compelling. First, the Court acknowledged that the State has a compelling interest in ensuring

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87. *Regan*, 461 U.S. at 548; *Rust*, 111 S. Ct. at 1772.

88. See, e.g., *Regan*, 461 U.S. at 546 n.7 (contrasting the ordinance in *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981), which regulated First Amendment activity by limiting individuals' expenditure of their own money, with a Congressional decision not to subsidize the plaintiff's lobbying).

89. *Simon & Schuster*, 112 S. Ct. at 509 (citing *Ragland*, 481 U.S. at 231). Justice Kennedy, in his concurrence, objected to the test employed by Justice O'Connor:

In my view it is both unnecessary and incorrect to ask whether the State can show that the statute "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." That test or formulation derives from equal protection jurisprudence, and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction on speech based on content only apart from any considerations of time, place and manner or the use of public forums.

*Simon & Schuster*, 112 S. Ct. at 512 (Kennedy, J., concurring). It is beyond the scope of this note to address the propriety of the test used by Justice O'Connor, which apparently represents a longstanding debate. See *id.* at 511 n.\*.

90. *Id.* at 512.

91. *Id.* at 511.

that victims of crime are compensated by those who harm them.<sup>92</sup> Second, the Court recognized a compelling state interest in ensuring that criminals do not profit from their crimes.<sup>93</sup> The Court was quick to foreclose any argument that the State had an interest in limiting the public outrage over criminals profiting from recounting their crimes. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>94</sup>

Interestingly, the state interest which the Court found to be compelling was not the state interest offered by the Board. The Board contended that there was a compelling state interest in "ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries."<sup>95</sup> Justice O'Connor responded that there was no explanation why the state's interest in compensating victims was greater when the source of funds was "storytelling" about the crime than when the assets were derived from any other source.<sup>96</sup> Most likely, the Board's basis for the distinction rested on the peculiar relationship between storytelling about a crime and the related victimization. The Court had already foreclosed the possibility that this could be a valid basis for the distinction, however, when Justice O'Connor rejected "any interest in limiting whatever anguish Henry Hill's victims may suffer from reliving their victimization."<sup>97</sup>

#### b. The Narrowly Tailored Requirement

Having found a compelling state interest, Justice O'Connor examined whether the law was narrowly tailored to advance that interest. It was on this requirement that New York's Son of Sam law failed constitutional scrutiny. The Court held that, as a means of compensating victims from the fruits of crime, the Son of Sam law was "significantly overinclusive."<sup>98</sup>

The requirement that a regulation on speech be narrowly tailored imposes a limitation on *how* the government may advance a compelling state interest. This "overbreadth doctrine" requires that a regulation not "burden substantially more speech than is necessary to further the gov-

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92. *Id.* at 509.

93. *Id.* at 510.

94. *Id.* at 509 (quoting *Texas v. Johnson*, 491 U.S. 397, 419 (1989)).

95. *Id.* at 510 (quoting Brief for Respondents, *supra* note 15, at 46).

96. *Id.* at 510.

97. *Id.* at 509.

98. *Id.* at 511.



ernment's legitimate interests."<sup>99</sup> In other words, "government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."<sup>100</sup>

The Court focused on two aspects of the statute which made it overbroad. First, the statute applied even to works that only tangentially or incidentally reflected on the crime.<sup>101</sup> Second, the statute defined "criminal" very broadly to include not only those charged, tried, or convicted of a crime, but also anyone who admits to a crime in her work.<sup>102</sup> These two factors combined to potentially encompass a large number of works on a wide range of subjects. Justice O'Connor listed several prominent works of literature which would have, in theory, come under the Son of Sam restriction.

Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as *The Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even *The Confessions of Saint Augustine*, in which the author laments "my past foulness and the carnal corruptions of my soul," one instance of which involved the theft of pears from a neighboring vineyard.<sup>103</sup>

The low point for the Board occurred during oral argument, when Justice Scalia remarked, "you speak as though the law very nicely cuts out the profits that he is making because of his [recounting] of the crime. But, in fact, it does not. It says whatever amount he gets from the whole book. So, you know, there is *Confessions of St. Augustine*; he recounts how he stole an apple. I assume that, whatever St. Augustine got for that book, the whole amount—right?—the whole thing would be considered proceeds of the apple stealing?" The attorney for the Board began by

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99. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

100. *Id.* A litigant must usually show that the statute is unconstitutional as applied to her. The overbreadth doctrine instead tests constitutionality in terms of its potential application. Some refer to this as an exception to the "standing" requirement, while others assert that the doctrine is distinct from that of standing. The latter is probably the better view. There are important policy reasons to look at the potential application in First Amendment cases, independent of the policies behind the standing requirement. First, an overly broad statute is likely to have a chilling effect on free speech. Those whom the statute could not constitutionally reach may simply not exercise their right to speak so as to avoid the time, risk or expense of litigation. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852-58 (1970). Second, an overly broad statute is too malleable and highly vulnerable to erratic or selective enforcement by authorities—that is, enforcement that discriminates against certain classes of people or certain points of view. *Id.* at 871-73.

101. *Simon & Schuster*, 112 S. Ct. at 511.

102. *Id.*

103. *Id.*

saying, "Your honor, that's absolutely correct." Justice Scalia cut off any further comment by retorting, "But that's ridiculous!"<sup>104</sup>

In summing up the problem Justice O'Connor noted:

Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the Board would control his entire income from the book for five years, and would make that income available to all of the author's creditors, despite the fact that the statute of limitations for this minor incident had long since run. That the Son of Sam law can produce such an outcome indicates that the statute is, to say the least, not narrowly tailored to achieve the State's objective of compensating crime victims from the profits of crime.<sup>105</sup>

### III

#### Creating Constitutional Son of Sam Legislation

The Supreme Court left open many possibilities for legislation designed to ensure that criminals compensate their victims. Lawmakers can now be certain that they have a compelling interest in providing compensation for crime victims from the criminal rather than from the state.<sup>106</sup> A slightly more narrow interest, determined by the Supreme Court to be compelling, is compensating victims from the fruits of the crime.<sup>107</sup> The Court explicitly declined to address the constitutionality of Son of Sam legislation of the federal government or the other states.<sup>108</sup> However, many of those statutes will be affected in one way or another by the decision. The following paragraphs offer suggestions for second-generation Son of Sam laws and warn of potential pitfalls.

##### A. A Narrowly Tailored Content-Based Statute

Arguably all that is necessary to bring Son of Sam legislation into compliance with the Supreme Court's dictates is to tailor the laws more narrowly.<sup>109</sup> An essential step in this direction would be to limit the applicability of a content-based forfeiture provision to only those works that are at least predominantly about the crime. This would avoid the problems that the court acknowledged of classifying all royalties as

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104. Lyle Denniston, AM. LAW., Jan./Feb. 1992, at 108.

105. *Simon & Schuster*, 112 S. Ct. at 512.

106. *Id.* at 509-10. See also N.Y. EXEC. LAW art. 22 ("It is the declared policy of this state that financial assistance, counseling and re-training should be made available to crime victims to rehabilitate them physically, emotionally and occupationally for the injuries they have sustained at the hands of a criminal.").

107. *Simon & Schuster*, 112 S. Ct. at 511.

108. *Id.* at 512.

109. *Id.*

"fruits of crime," even when the work only incidentally or tangentially mentioned a crime.<sup>110</sup>

A second essential change would be to make the funds available only to the criminal's victims, and not to the criminal's general creditors. Although the Court mentioned this only in passing,<sup>111</sup> it is abundantly clear that allowing general creditors of a criminal to reach the escrow account in no way serves the state interest of compensating victims. Eliminating such a provision would narrow the statute's scope to better serve the state interest.

Another way to narrow a content-based forfeiture law to better compensate victims from the fruits of crime would be to escrow profits only when there is a reasonably likely chance that the money will actually be paid to the crime victim. Rather than automatically seizing story-telling proceeds for five years, regardless of whether particularized victims exist and regardless of the likelihood that the funds will actually be used to compensate victims, the legislature could require that any person contracting with a criminal for the story of her crime be required to *notify* the Victims Board. If the victim already possesses a judgment or reparation order against the criminal, or if the Board has already made reparation payments to the victim, the Board could require that the funds be turned over and used to satisfy the judgment or to reimburse the Board.

If the victim has not yet obtained a judgment against the criminal or if the Board is unaware of the victim's whereabouts, the Board could order the party contracting with the criminal to withhold the criminal's profits for a limited period of time after notification, say one year. If the Board is unable to locate the victim, or if the victim does not initiate suit against the criminal during that time, the contracting party could then turn the funds over to the criminal. If, however, the victim does initiate suit, the Board should be able to seize the assets until disposition of the civil suit, because at that point there is a reasonable likelihood that the state interest will be served.

There are several problems with this content-based, narrowly tailored approach. First, the statute would still be a content-based burden on protected speech. It would still be presumptively unconstitutional and subject to strict scrutiny. Second, there is no guarantee that even a book entirely about a crime would be definitively characterized as the

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110. *Id.* at 511. Justice O'Connor also noted that the statute was not narrowly tailored because "a *substantial portion* of the burden on speech does not serve to advance [the state's goals]." *Id.* at 511 n.\* (emphasis added).

111. *Id.* at 512.

"fruits of crime."<sup>112</sup> Justice O'Connor explicitly declined to address this issue.<sup>113</sup> "Proceeds of a crime" is defined in New York's forfeiture statute as "any property obtained through the commission of a felony crime."<sup>114</sup> This has been construed to require that the property be "directly related to criminal activity."<sup>115</sup> It would be difficult to argue that book proceeds are derived "directly" from criminal activity, in contrast to the money taken in a bank robbery, the profits from a drug sale, or the profits from a stock trade based on inside information.

A third problem with narrowing existing Son of Sam laws is that such laws could be considered underinclusive, a point that the Supreme Court declined to reach.<sup>116</sup> Justice Blackmun, in his concurrence, urged that the Court should have declared New York's law to be underinclusive as well as overinclusive.<sup>117</sup> There are at least two potential underinclusiveness arguments. One is that the Son of Sam law has operated to compensate victims of crime in a minimal number of situations. While only \$85,000 has been paid to victims under section 632-a since its inception in 1977, the Board has paid \$8.6 million to victims from public funds *in the past year*.<sup>118</sup> Another argument is that if royalties derived from storytelling about a crime could be considered "crime proceeds," then other income made or enhanced by the criminal's notoriety, but on a subject other than her crime, may similarly be considered proceeds of the crime, yet not be encompassed by the statute.<sup>119</sup>

To better avoid these pitfalls, legislatures should consider adopting a content-neutral law instead.

## B. Creating a Content-Neutral Law: The New York Approach

The New York legislature has enacted a significantly more drastic change in its law.<sup>120</sup> The result is a triumph for crime victims and is far

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112. The compelling state interest recognized by the Court was compensating victims from the *fruits of the crime*. *Id.* at 511.

113. *Id.* at 510.

114. N.Y. CIV. PRAC. L. & R. 1310 (McKinney Supp. 1992). *But see infra* notes 134-137 and accompanying text.

115. *Vergari v. Lockhart*, 144 Misc. 2d 860, 865 (N.Y. Sup. Ct. 1989).

116. *Simon & Schuster*, 112 S. Ct. at 511 n.\*.

117. *Id.* at 512 (Blackmun, J., concurring).

118. *Wise, supra* note 33, at 1.

119. "John Ehrlichman can write novels with no concern that his royalties, doubtless augmented by the fame attending his Watergate crimes, will be held for five years to pay claims of victims or other creditors." *Simon & Schuster v. Fischetti*, 916 F. 2d 777, 785 (2d Cir. 1990) (Newman, J., dissenting), *rev'd*, 112 S. Ct. 501 (1991). Neither would the law escrow profits garnered when a career bank robber becomes a bank security consultant, or when a burglar later uses his criminally acquired expertise as a locksmith.

120. Act of July 24, 1992, ch. 618, 1992 N.Y. LAWS 618 (act enlarging the opportunity for crime victims to be compensated by criminals).

less intrusive on First Amendment rights. The new act, described in detail below, provides crime victims with comprehensive recovery provisions without discriminating against speech or against speech of a particular content. This content-neutral approach should be applauded and considered by the many other jurisdictions faced with rewriting their Son of Sam legislation.

### 1. *Background*

New York argued that the specialized recovery provisions of the Son of Sam law were necessary, because traditional tort remedies were inadequate to compensate crime victims.<sup>121</sup> Many victims found that seeking damages from the criminal who harmed them is simply not worth the time and money of litigation if the criminal has no assets,<sup>122</sup> or if other creditors have superior rights to them. When the criminal later realizes profits from selling his story, all too often the statute of limitations on the victim's cause of action has expired, leaving the victim empty-handed at the time the criminal is exploiting his notoriety. As succinctly suggested by Judge Newman in his circuit court dissent, however, if New York's traditional attachment remedies are currently too limited to be used by many crime victims, "the answer required by the First Amendment is to broaden the remedies, not to select books about crime for special regulation."<sup>123</sup>

### 2. *Expanding Restitution and Reparation Orders as Part of the Criminal Sentence*

The first principal change effectuated by the New York act greatly expands the law of restitution and reparation. It creates a presumption that a court shall order a criminal to pay restitution of the fruits of the

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121. Brief for Respondents, *supra* note 15, at 7 (noting that by the time book profits, often the only significant asset of a criminal, are acquired, the tort and wrongful death statute of limitations have run). The Supreme Court apparently found little merit in this claim. Justice O'Connor commented that the state interest of compensating victims by those who harm them is served by a body of tort law, prejudgment remedies, orders of restitution and crime proceed forfeiture statutes. *Simon & Schuster*, 112 S. Ct. at 509-10 (citing N.Y. CIV. PRAC. LAW §§ 6201-6226 (McKinney 1980 and Supp. 1991) and N.Y. PENAL LAW § 60.27 (McKinney 1987)).

122. Okuda, *supra* note 17, at 1361 (citing R. REIFF, *THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM'S FORGOTTEN RESPONSIBILITY* 137 (1979)) ("Ninety percent of convicted criminals have annual incomes of less than \$5000. . . . Over half of convicted felons are unemployed at the time of arrest."). *But see Simon & Schuster*, 916 F.2d at 785-86 (Newman, J., dissenting) (arguing that many criminals have assets independent of the proceeds of their crime).

123. *Simon & Schuster*, 916 F.2d at 786 (Newman, J., dissenting).

offense and reparation for the victim's out-of-pocket losses.<sup>124</sup> The sentencing court may only refuse such an order when "the interests of justice dictate otherwise," in which case the court must clearly state its reasons on the record.<sup>125</sup>

Once an order of restitution or reparation has been imposed, it becomes part of the criminal's sentence and places limitations on when the sentence can be deemed fully discharged. Termination of a sentence of probation may not be granted until the court is satisfied that the defendant has made "a good faith effort" to comply with the order.<sup>126</sup> Likewise, a period of conditional discharge may be extended for up to two additional years, with all of the incidents of the original sentence, if an order of restitution or reparation has not been satisfied.<sup>127</sup>

A victim may collect an order of restitution or reparation in the same manner as a money judgment obtained in a civil action.<sup>128</sup> The new law adds that when such an order is entered, it shall constitute a first lien on any real property thereafter acquired by the criminal;<sup>129</sup> this lien will have priority over all other liens, security interests, or encumbrances, except government liens and purchase money security interests.<sup>130</sup> The law further adds that a court may order that any cash bail posted by a defendant be first applied toward satisfying the restitution or reparation order, and second to paying any criminal fines imposed on the criminal.<sup>131</sup>

These provisions are a tremendous benefit to crime victims. Besides broadening the number of victims who will be compensated by their victimizer, these laws relieve the victim from being forced to institute a civil action against the criminal to recover his out-of-pocket losses. The law also gives victims priority to any after-acquired real property of the criminal and to any amount of cash bail posted by the criminal. Further-

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124. 1992 N.Y. LAWS 618, § 12 (to be codified at N.Y. EXEC. LAW § 641(3)(d)). Court-ordered restitution requires compensation of "the fruits of the crime." 1992 N.Y. LAWS 618, § 12. Court-ordered reparation is confined to reimbursement of "out-of-pocket" losses. 1992 N.Y. LAWS 618, § 12. New York Executive Law section 626 defines out-of-pocket loss to mean "unreimbursed expenses . . . or indebtedness reasonably incurred for medical care or other services necessary as a result of the injury upon which such claim is based." The law also includes the cost of counseling for eligible family members of a homicide victim, and for a sex offense victim and the victim's spouse, and the cost of residing in a shelter for battered spouses and children. The definition also includes reasonable attorneys' fees up to \$1,000. N.Y. EXEC. LAW § 626 (McKinney 1982 & Supp. 1992).

125. *Id.*

126. 1992 N.Y. LAWS 618, § 5 (to be codified at N.Y. CRIM. PROC. LAW § 410.90(3)(a)).

127. 1992 N.Y. LAWS 618, § 14 (to be codified at N.Y. PENAL LAW § 60.27(5)(a)).

128. N.Y. CRIM. PROC. LAW § 420.10(6) (McKinney 1983 & Supp. 1992).

129. 1992 N.Y. LAWS 618, § 8 (to be codified at N.Y. CRIM. PROC. LAW § 420.10(6)).

130. *Id.*

131. 1992 N.Y. LAWS 618, § 6 (to be codified at N.Y. CRIM. PROC. LAW § 420.10(1)(e)).

more, since the order is recoverable like any civil money judgment, the victim can seek recovery from *any* of the criminal's attachable assets, not just those derived from speech-related activities.

### 3. *Extending the Statute of Limitations for Crime Victims*

The second major change of the new act extends the statute of limitations during which a crime victim may commence a civil action against a criminal for economic harm not otherwise compensable by court-ordered restitution and reparation.<sup>132</sup> A crime victim now has seven years from the date of the crime in which to initiate suit against the criminal perpetrator.<sup>133</sup> Once a money judgment is obtained, the victim stands in the position of any judgment creditor with access to all assets of the criminal, including, but not limited to, assets derived from criminal storytelling.

As in the restitution and reparation provisions discussed above, this section extending the statute of limitations in no way singles out profits derived from speech for discriminatory treatment. This will eliminate the most troubling aspects of the original Son of Sam law, namely treating income derived from speech of a particular content more restrictively than other income. As content-neutral provisions, these laws would have little difficulty meeting the lesser standard of scrutiny. In fact, these provisions do not seem to implicate the First Amendment at all.

### 4. *Broadening the Definition of "Crime Profits"*

Section 10 of the act replaces the former Son of Sam language with an ostensibly content-neutral provision.<sup>134</sup> While not explicitly referring to a criminal's storytelling profits, this section defines "profits from the crime" very broadly,<sup>135</sup> and provides a crime victim with greater access to these profits than to any other assets owned by the criminal.<sup>136</sup>

The new Executive Law section 632-a defines "profits from the crime" to mean:

- (i) any property obtained through or income generated from the commission of a crime of which the defendant was convicted; (ii) any property obtained by or income generated from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such sale, conversion or exchange; and (iii) any property which the defendant obtained or income generated as a result of having committed the

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132. 1992 N.Y. LAWS 618, § 1 (to be codified at N.Y. CIV. PRAC. L. & R. 213-b); LEGISLATIVE HISTORY OF 1992 N.Y. LAWS 618, at 2 (1992). *See supra*, note 124 (explaining what orders of restitution and reparation cover).

133. 1992 N.Y. LAWS 618, § 1 (N.Y. CIV. PRAC. L. & R. 213-b).

134. 1992 N.Y. LAWS 618, § 10 (to be codified at N.Y. EXEC. LAW § 632-a).

135. 1992 N.Y. LAWS 618, § 10 (N.Y. EXEC. LAW § 632-a(1)(b)).

136. 1992 N.Y. LAWS 618, § 10 (N.Y. EXEC. LAW § 632-a(3)).

crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of the crime, as well as any property obtained by or income generated from the sale, conversion or exchange of such property and any gain realized by such sale, conversion or exchange.<sup>137</sup>

The law goes on to provide that any entity which "knowingly contracts for, pays, or agrees to pay, any profits from a crime" as defined above, must notify the crime victims board of those profits.<sup>138</sup> The Board must then notify the victims of the existence of those profits.<sup>139</sup> The victim has three years after notification in which to initiate a civil action against the criminal, regardless of any other statute of limitations provision.<sup>140</sup> However, the victim can recover money damages "only up to the value of the profits of the crime."<sup>141</sup> The profits, as defined in this section, can be seized only *after* the victim initiates an action for damages against the criminal, at which point the Board has authority to preserve the assets by attachment or other provisional remedy.<sup>142</sup> In practice, this section will be utilized only when the normal seven-year statute of limitations as described in the preceding section has passed, since judgments recovered during that period are recoverable from *all* of the criminal's assets.

Despite its purported content-neutrality, this provision seems to implicate First Amendment concerns because of its vagueness, and because its practical effect will be to actually only reach profits derived from speech-related activities. This section is admittedly an attempt to recapture much of what was lost by the *Simon & Schuster* decision.<sup>143</sup> Since the "fruits of crime" will presumptively already be the subject of a restitution order recoverable from any of the criminal's assets,<sup>144</sup> subsection (iii) of the new definition would seem to be the only provision of this section that has any additional effect. Classifying property gained by a criminal's "unique knowledge obtained during the commission" of a crime as "crime profits" subject to seizure is particularly vague and uncertain, and may present constitutional problems on that ground. Furthermore, it is difficult to imagine a practical application of this subsection, other than a criminal's contract with someone to publicly recount his crime. Other instances of property gained by "unique knowl-

137. 1992 N.Y. LAWS 618, § 10 (to be codified at N.Y. EXEC. LAW § 632-a(1)(b)) (emphasis added).

138. 1992 N.Y. LAWS 618, § 10 (N.Y. EXEC. LAW § 632-a(2)(a)).

139. 1992 N.Y. LAWS 618, § 10 (N.Y. EXEC. LAW § 632-a(2)(b)).

140. 1992 N.Y. LAWS 618, § 10 (N.Y. EXEC. LAW § 632-a(3)).

141. *Id.*

142. 1992 N.Y. LAWS 618, § 10 (N.Y. EXEC. LAW 632-a(4-6)).

143. LEGISLATIVE HISTORY OF 1992 N.Y. LAWS 618, at 2 (1992).

144. See *supra* note 124 and accompanying text.



edge," as in a case where money is being hidden, will not, in practice, be disclosed to the Board by the criminal, and hence never be reached by the victim.

Regardless of the outcome of this debate, the provision will withstand constitutional scrutiny under *Simon & Schuster*. Even if the law could be considered content-based, it is nevertheless narrowly tailored to serve the compelling state interest of compensating victims from the fruits of crime. Significantly, the new definition provided in this section would not include profits from works which only briefly mentioned a crime, since such a reference could not reasonably be construed to "generate" the profits. Secondly, unlike the original Son of Sam law, these assets can only be seized after suit is initiated by the victim. At this point it is reasonably likely that the funds will actually serve the state interest. Free speech is far less burdened by this approach, because the criminal has immediate access to her profits, unless and until a victim files and recovers a claim for damages.

Furthermore, this section only marginally increases a victim's potential to recover from the criminal. The provisions of the act providing for expanded restitution and reparation, and for judgments obtained during the seven-year extended statute of limitations, already create a significant opportunity for a victim to recover from any of a criminal's assets, including assets derived from storytelling about the crime.

#### IV Conclusion

The Son of Sam law struck down in *Simon & Schuster* originated with good intentions. Even staunch First Amendment advocates can admit to a sense of outrage at a criminal laughing his way to the bank as a result of selling the story of his heinous crime. Governmental abridgment of speech because of such outrage, however, is the very heart of that which the First Amendment was designed to prevent:

The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.<sup>145</sup>

The number of victims who can potentially benefit from the new law is significantly larger than those who could recover under the original Son of Sam law. Whereas only a small percentage of criminals actually

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145. *Simon & Schuster v. N.Y. Crime Victims Board*, 112 S. Ct. 501, 508 (1991) (citing *Cohen v. California*, 403 U.S. 15, 24 (1971)).

receive remuneration for storytelling about their crime,<sup>146</sup> a logical assumption is that a much greater number of criminals will eventually acquire assets through a broader range of sources, whether from employment, gift or devise, storytelling, or any other method. The number of victims who can access these assets for compensation is commensurately enlarged.

Creating a method whereby those who are victimized can be helped is an important societal objective, particularly when the goal is that the criminals, and not the taxpayers, bear these costs. When this goal can be accomplished more effectively without burdening free speech, all states should pursue such a course.

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146. *See supra* note 33.

